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硕 士 学 位 论 文

夫妻共同债务认定规则研究

Research on the Regulation of Recognizing the
Matrimonial Community Debt

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内容摘要

夫妻共同债务是夫妻财产制中的重要组成部分，正确认定夫妻共同债务，合理划分夫妻个人债务和共同债务的范围，将直接关系到夫妻双方及与夫妻双方或一方存在债权债务关系的第三人的利益。我国夫妻共同债务认定制度正日趋完善，但仍不能完全适应市场经济的发展变化。《婚姻法解释二》第 24 条所确立的夫妻共同债务推定规则作为认定夫妻单方举债行为是否为夫妻共同债务的重要依据最大限度地保护了债权人利益，但债务人配偶的合法利益却得不到应有保障，由此造成的种种现实困境亟待解决。笔者从在司法实践中遇到的典型案例出发，对夫妻共同债务的基本理论、现行我国夫妻共同债务认定规则存在的现实冲突和理论冲突等进行逐层分析，从而就我国夫妻共同债务认定规则的完善提出若干建议。

本文除引论和结语外，正文共三章。

第一章夫妻共同债务基本理论的概述。从债的角度阐述夫妻共同债务的概念，对其具有的人身性、相对性、连带性等特征进行分析，从而明确夫妻共同债务的内涵。研究夫妻共同债务的主要类型，主要包括为夫妻共同生活所负、夫妻共同缔结、夫妻为履行法定义务或是夫妻共享债务利益等债务。后就夫妻共同债务认定的法理依据包含意思自治原则、日常家事代理权理论、表见代理理论等进行阐述，了解区分夫妻共同债务与个人债务的重要意义，从而明确本文研究对象为夫妻共同债务的认定规则，为下文的研究奠定基础。

第二章我国夫妻共同债务认定规则的评析。分析我国夫妻共同债务推定规则在维护交易安全、简化办案程序等具有一定的积极意义。通过阐述其与债的相对性原则、民法的公平性原则、日常家事代理权理论的巨大冲突，得出该规则具有明显的理论缺陷。分析推定规则在现实适用过程中出现的种种困境及我国司法实践对夫妻共同债务推定规则的部分突破，明确我国现行夫妻共同债务推定规则需要修改的结论。

第三章我国夫妻共同债务认定规则完善的建议。一方面对完善有关夫妻共同债务相关制度的建立进行探讨，包括提升立法结构和层次、建立日常家事代理权制度、分居债务制度、大额债务夫妻共同签字等制度；另一方面，对夫妻共同债务的认定规则进行重构，对于夫妻单方举债的债务建立以原则上推定为个人债务、并补充三种情况为例外的规则来平衡债权人与债务人配偶的利益。同时，强调法官在认定案件事实时对当事人各方举证责任合理分配的重要性，从而使法的公平正义价值得到真正实现。

关键词：夫妻共同债务 日常家事 表见代理

ABSTRACT

As the matrimonial community debt is an important part of the marital property system, so the correct definition of the husband and wife common debts, and reasonable division of the couple's personal debt and common debts will be directly related to the interests of a couple or a third party having debt obligations relationship with a party of the couple or the couple. Though the system of recognizing the matrimonial community debt in our country is becoming more perfect, it still can not be fully adapt to the market economy development, and as the matrimonial community debt presumption rule established by Article 24 of the Interpretation of the Marriage Law (II) is an important basis as to define whether obligations of one party of the couple is common debt of the husband and wife and protects the utmost interests of the creditor, but the legal interests of the party of the couple who has no obligations can not be guaranteed, resulting in various practical difficulties to be resolved. From the typical cases in the judicial practice, the author analyzes the basic theory of common debt, the real conflict and the conflict between the theory and the reality of the common debt, and brings up suggestions as to the rules of definition of common debts in our country.

Besides the introduction and conclusion, the text consists of three chapters.

Chapter 1 is overview of the basic theory of the matrimonial community debt. to explain the concept of the common debt of the husband and wife from the perspective of debt, to analyze the characteristics of its personal, relative, joint and so on, so as to clarify the connotation of the husband and wife joint debt. The main types of the study of the matrimonial community debt mainly includes the debts owe to by the couple for common living, the debts included by the couple, the debts resulted by the couple for performing statutory duties, or the debts resulted by the couple for sharing the interests of the debts and so on. Then, the legal basis of the matrimonial community debt, including the principle of autonomy, the daily family agency theory, the theory of agency theory are described and the important significance of distinguishing between the matrimonial community debt and personal debt are understand to explicit that the

research object is the definition rule of the matrimonial community debt, so as to lay the foundation for the following.

The second chapter is the analysis of the regulation of recognizing the matrimonial community debt in our country. It is of positive significance for the analysis of the matrimonial community debt in the maintenance of transaction security and simplifying the handling procedures. Through expounding the conflict between the definition rule of the matrimonial community debt and the relativity principle of the debt, the fair principle of civil law and the daily family agency, to conclude the rule has obvious theoretical defect. To analyze the difficulties in the practical application of the presumption rule and the breakthrough of the part of our country's judicial practice in the regulation of the common debt of the husband and wife, and explicit the conclusion that the presumption rule should be modified.

The third chapter is the suggestion of the perfection of the matrimonial community debt in our country. On one hand to discuss the building of improving the relevant system of the matrimonial community debt, including improving the legislative structure and level, the establishment of the daily family agency system, the system of debts living in separation, the system of common signature in large debt and on the other hand, to reconstruct the recognition rules, that is, as to the debt being owed by one party of the couple is in principle estimated to be the personal debt, and balance the interests of the creditors and the other party of the couple who does not owe the debts by three except cases. At the same time, it emphasizes the importance of reasonable distribution of the burden of proof of the parties concerned, so that the fair and justice value of law can be realized.

Key words: The matrimonial community debt; Agency of daily household affairs; Agency by estoppel

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引言

一、研究背景和研究意义

随着近年来民间资本的活跃，法院审理的民间借贷案件也日益增多，而债权人根据《最高人民法院关于适用〈中华人民共和国婚姻法〉若干问题的解释（二）》（以下简称《婚姻法解释二》）第 24 条要求夫妻共同偿还借款从而实现自身债权的案件比例亦明显增多。笔者尚在基层法院民事审判庭时亦常碰到此类案件，结果往往是因债务人及其配偶无法对其抗辩主张提供充足证据而适用《婚姻法解释二》第 24 条认定债务为夫妻共同债务，判决由夫妻共同承担清偿责任，且不论是夫妻共同举债还是夫妻单方举债。对于其中夫妻单方举债却由夫妻共同偿还的案件笔者略感对债务人配偶不公，但基于对夫妻关系特殊性的考量笔者未作深究。但 2011 年中院审判监督庭的一份再审判决书却引起笔者对夫妻共同债务的思考，并开始了对《婚姻法解释二》第 24 条确立的夫妻共同债务推定规则的研究，对其在审判实践中的滥用笔者深感忧虑。

笔者所见的再审案件的基本案情是：2009 年 9 月，宋某在与李某婚姻存续期间以需资金周转为由向骆某借款 10 万元，并立下借条一张。借款期限届满后，宋某未按约还款付息。骆某遂向法院提起诉讼，要求宋某、李某共同归还借款本息。一审根据宋某所立借条对骆某与宋某的借贷关系予以确认，同时，根据《婚姻法解释二》第 24 条，认定讼争款为宋、李二人的夫妻共同债务，李某应与宋某共同清偿借款本息。李某辩称债务未用在夫妻共同生活不属于夫妻共同债务，但因未能提供充分证据予以证明，法院对此不予采信。李某不服提起上诉。在二审过程中，李某向二审法院提交 E 时代卡帐户历史明细清单及电子数据勘查报告，用于证明讼争借款从打入宋某帐号后无其他钱转进该账户，该账户的钱都是转出用于网络赌球，并未用于家庭支出，不属于夫妻共同债务，二审法院对该证据及其证明内容予以了确认。同时，根据《婚姻法》第 41 条的规定，认为适用《婚姻法解释二》第 24 条的前提是债务应为夫妻共同生活所负才可按夫妻共同债务处理，因此，驳回了骆某对李某的诉求。骆某不服二审判决申请再审，再审法院认定的事实与

二审查明的事实一致，但却从债权人骆某的角度出发，认为其在出借钱时不知宋某将借来的钱用于赌博，主观上不存在恶意，且讼争案件不存在《婚姻法解释二》第 24 条规定的例外情形，认定讼争款为夫妻共同债务，又维持了一审判决。^①

一桩看似简单的民间借贷纠纷，因是否适用《婚姻法解释二》第 24 条的不同，历经一审、二审、再审程序，可谓“一波三折”，最终判决的合理性却有待商榷的。而经笔者研究，这绝非个案，司法实践中因是否直接引用《婚姻法解释二》第 24 条认定夫妻单方所负债务为夫妻共同债务的意见不同，而导致“同案不同判”现象时有发生，进而导致法院公信力受损，法律权威受挫。

如何在夫妻财产关系复杂化、多样化的大趋势下准确认定夫妻共同债务将直接影响到夫妻双方及与夫妻一方或双方有债权债务关系的第三人的利益，甚至还关系到市场经济交易秩序的稳定。我国夫妻共同债务制度正日趋完善，但仍不能完全适应市场经济的发展变化，夫妻共同债务推定规则作为司法实践中认定夫妻单方举债行为是否为夫妻共同债务的最主要依据，在某些方面有利于保护债权人合法权益、简化法院办案程序，但其弊端也日益显现，夫妻一方恶意举债甚至与债权人恶意串通伪造债务的情况时有发生，夫妻另一方合法利益得不到应有保障。出于对法的价值——正义与公平的追求，以及对不同主体利益的平衡，对夫妻共同债务认定问题的进一步研究具有重大现实意义。

二、研究现状

夫妻财产制度包含积极财产和消极财产两个方面，由于历史原因，专家学者们对于积极财产的界定、处分、分割等内容研究已较为详细深入，但对于作为消极财产的夫妻债务的认定、清偿等研究则较散见于婚姻家庭法、夫妻财产制研究中，内容大多也只是对概念、性质及类型等的阐述，而对夫妻债务认定规则的论述主要分散在部分学者及司法实践者的文章中，如马忆南教授在《〈婚姻法司法解释（二）〉的解读与评论》文章中对《婚姻法解释二》第 24 条规定的两种例外情形的不足进行分析，裴桦教授在其《夫妻共

^① 案情详见（2011）岩民再终字第 7 号判决书。

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